IN THE HIGH COURT OF JUDICATURE OF MADRAS

DATED : 26.02.2007

CORAM

THE HONOURABLE MR.JUSTICE M.JAICHANDREN

S.A.No.338 of 1996

M.Sivaprakasa Mudaliar .... Appellant/Defendant.

Vs.

1. Padmavathy (died)
2. Dinakaran
3. Venkitesan
4. Chandrasekaran
5. Mohan

(Respondents 2 to 6 are recorded as legal representatives of the deceased first respondent vide order of Court, dated 05.09.06, made in memo filed by appellant)

6. P.Banumathi. .... Respondents/LRs of the Plaintiffs.

The present Second Appeal No.338 of 1996 has been filed against the Judgment and Decree, dated 17.11.1995, made in A.S.No.91 of 1993, on the file of the Sub-ordinate Judge, Arni, confirming the Judgment and Decree, dated 28.04.1993, made in O.S.No.332 of 1990, on the file of the Additional District Munsif, Arni.

For appellant : Mr.Parthasarathy,
Senior Advocate
for M/s.Sarvabhauman Associates

For respondents : Mr.R.Gopalakrishnan.

J U D G M E N T

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The present Second Appeal No.338 of 1996 has been filed against the Judgment and Decree, dated 17.11.1995, made in A.S.No.91 of 1993, on the file of the Sub-ordinate Judge, Arni, confirming the Judgment and Decree, dated 28.04.1993, made in O.S.No.332 of 1990, on the file of the Additional District Munsif, Arni.

2. Heard the learned counsel appearing for the appellant as well as the respondents.

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3. The appellant in the present appeal was the defendant in the suit O.S.No.332 of 1990. The plaintiff had filed the said suit praying for declaration of title and for permanent injunction. It was stated in the plaint that the properties described in the Schedule along with some other properties belong to the plaintiff, the defendant and A.M.Annamalai Mudaliar, as joint family properties. By a partition deed, dated 25.01.1957, they had divided the properties. A.M.Annamalai Mudaliar had sold the properties allotted to him to various persons. In the property in Survey No.283/2A in Sevur village, out of the 10.59 acres, the defendant had taken five acres and sold the property in the year 1972. One Palani Mudaliar, who had bought the property, had insisted that all the three persons, namely, the plaintiff, the defendant and A.M.Annamalai Mudaliar should sign and register the sale deed, since the partition deed was an unregistered one. Therefore, all the three together had executed the sale deed. Thereafter, the plaintiff had enjoyed the remaining 5.59 acres in Survey No.283/2A and was in possession and enjoyment of the same for the past 18 years, without any interference from others. In such circumstances, the plaintiff has also perfected title by adverse possession.

4. The plaintiff had also stated that the defendant did not have any right or claim in the suit property. However, he has been threatening, from 12.04.1990, to enter the suit property and to sell the same. The defendant being rich and powerful, is thereby attempting to cause trouble to the plaintiff. Therefore, the plaintiff had filed the present suit to restrain the defendant and his men, by way of permanent injunction, from in any way interfering with the plaintiff's enjoyment of the suit property and further to restrain the defendant from selling the property to third parties.

5. The defendant in the suit and the appellant in the present Second Appeal had filed a written statement in O.S.No.332 of 1990 denying the claims and the allegations made by the plaintiff. The defendant had also stated that the Survey No.283/2A of Sevur village consisted of an extent of 10.59 acres, which belonged to the plaintiff, the defendant and A.M.Annamalai Mudaliar. It was also stated that under a 'Koorchit' , dated 25.01.1957, the properties were divided and each of the brothers were given separate properties and the suit property in Survey No.283/2A consisting of 10.59 acres was kept in common for all the brothers. After giving one acre, out of the total extent of 10.59 acres to one A.M.Annamalai Mudaliar, the remaining 9.59 acres were to be divided equally between the plaintiff and the defendant. On 20.01.1972, the plaintiff , the defendant and A.M.Annamalai Mudaliar, had together sold five acres in favour of one Palani Mudaliar, S/o of Rathina Velu Mudaliar of Aranipalyam. While that being the case, the plaintiff has falsely alleged that the defendant had sold five acres in the year 1972 and had taken the entire sale consideration.

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6. The defendant had also stated that it was not correct on the part of the plaintiff to state that the purchaser had wanted A.M.Annamalai Mudaliar and the plaintiff to jointly execute the sale deed in his favour, since the 'Koorchit' was unregistered. It was also the case of the defendant that the plaintiff, who had the original 'Koorchit' with them, and had deliberately avoided filing the same before the Court with an ulterior motive. If the 'Koorchit' was filed, it would strengthen the stand of the defendant. The failure of the plaintiff to produce the 'Koorchit' could only lead to adverse inference against the plaintiff.

7. The defendant had also emphatically denied the claim of the plaintiff that he alone is in possession and enjoyment of the schedule mentioned property and that he has perfected title by adverse possession. Adverse possession cannot be claimed against the co-owner, unless ouster was also pleaded and proved by the plaintiff. The defendant had further stated that the plaintiff had no right, title or interest in the suit property. On the other hand, the defendant has equal right in the plaint schedule property , as per the 'Koorchit'. It is the plaintiff, who has been having a hostile attitude towards the defendant, had cut and carried away the standing trees, from one of the properties belonging to the plaintiff and the defendant jointly. On 04.10.1988, the defendant had issued a registered notice to the plaintiff calling upon him to pay the defendant, half of the value of the tress which were cut and taken away. Further, the defendant had also demanded for partition and separate possession of his half share in the properties. However, the plaintiff had not chosen to reply to the said notice, dated 04.10.1988.

8.The defendant had further stated in his written statement that even though there were attempts to settle the issue amicably, by way of panchayat, the plaintiff was not prepared to do so and he has come before to the Court with false allegations and unsustainable claims and therefore, the suit filed by the plaintiff deserves to be dismissed with costs.

9. On analyzing the rival contentions of the parties concerned, the trial court had framed the following issues for consideration :-

"1) Whether the suit property was got by the plaintiff by way of partition ?

2) Whether the plaintiff has got right by adverse possession?

3) Whether the plaintiff and the defendants are in joint enjoyment of the suit properties?

4) Whether the plaintiff is entitled to an order of permanent injunction?

5) What are the other remedies available to the plaintiff ?"

While deciding issues Nos.1 to 3, the trial Court had come to the conclusion that the plaintiff had got the suit property on 25.01.1957 and thereafter, the plaintiff has been enjoying the said property. This

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position is clear from the documents filed by the plaintiff in support of his claims and also based on the evidence let in on behalf of the plaintiff during the course of the trial. Therefore, the trial Judge had also concluded that the claim of the defendant that the partition had not taken place with regard to the suit property and that he is in joint enjoyment of the same along with the plaintiff could not be accepted. The trial court had found that the suit property belonged to the plaintiff and he had got it through the partition as claimed by him. With regard to issue Nos 4 and 5, the trial court had found that the suit property belonged to the plaintiff, exclusively, and that he was in enjoyment of the same and has granted the plaintiff's prayer for permanent injunction as prayed for.

10. To come to the above mentioned conclusions, the trial court had analysed the documentary and oral evidence let in on behalf of the plaintiff as well as the defendant. The trial court had relied on Exhibit A-1 filed on behalf of the plaintiff, which shows patta in his favour and the document marked as Exhibit A-4 showing that the electricity connection card had been given in the name of the plaintiff. Exhibits A-5 to A-10 are the receipts for payment of electricity consumption bills. The trial court had also relied on Exhibit A-11 which is the receipt with regard to additional deposit made in the electricity board and Exhibit A-12 the 'adangal' and Exhibits A-13 to A-25 which are the 'kist' receipts in the name of the plaintiff . The above documents had been relied on by the trial court to support the claims of the plaintiff that the suit property was in possession and enjoyment of the plaintiff. Exhibit A-26, is the death certificate of the plaintiff's grand father, dated 13.04.1967, and exhibits A-27 to A-28 are the identification cards of disbursement of fertilizers in the name of the plaintiff. Further, the trial court has analysed the evidence of the son of the plaintiff G.Mohan, who was examined as P.W.1 and the evidence of two other witnesses, who had deposed in favour of plaintiff . Exhibits D 1 to 5 were marked in support the rival contentions of the defendant and the defendant has deposed as DW-1, to support his claims.

11. The defendant had contended that since the plaintiff had prayed for restraining the defendant from selling the properties to third parties, it could be inferred that the defendant had also a share in the suit property. This contention has been rejected by the trial court stating that it was made only with the intention of preventing the third parties from coming into the picture. To prevent the third party rights arising with regard to the suit property, the plaintiff had made such a prayer and it is not very unusual for such a prayer being made. The trial court has also rejected the contention of the defendant that the claim of title by adverse possession made by the plaintiff cannot stand in the way of holding that the suit property belonged exclusively to the plaintiff, based on the family partition made earlier, on 25.01.1957. Further, with regard to the claim of the defendant that since the plaintiff had also signed in the sale deed dated 06.10.1974, it should be inferred that the

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family properties including the suit property, was in joint possession in this regard. The trial court has found that the plaintiff had also signed the said sale deed only because there were certain rival claims with regard to the properties and that the buyer had insisted that all the persons of the family, including the plaintiff and the defendant, who might have a claim on the property in some way or the other, should sign the sale deed. Only in such circumstances, the plaintiff had also signed in the sale deed, dated 06.10.1974. In such circumstances, on relying on the documents filed in favour of the plaintiff, and on the evidence that was on record, the trial court had come to the conclusion that the plaintiff was in exclusive possession and enjoyment of the suit properties and that his prayer for permanent injunction against the defendant would be sustained. Since the trial court had decreed the Original Suit O.S.No.332 of 1990 in favour of the plaintiff therein, the appellant in the present second appeal, had filed an appeal A.S.No.91 of 1993 on the file of the Sub-Court, Arni, stating that the trial court had passed the Judgment and Decree in favour of the plaintiff without properly appreciating the documentary and oral evidence. It was further stated that the trial court had not considered in proper perspective the fact of a notice having been issued by the defendant to the plaintiff before the suit had been filed and that the plaintiff had not replied to the said notice, marked as Exhibit B-1. Another ground raised by the defendant in the suit and the appellant in the first appeal is that the non-filing of 'Koorchit' by the plaintiff should have resulted in the suit being dismissed. The trial court had not taken into account the decided cases cited before it, while passing the Judgment and Decree in favour of the plaintiff."

The first appellate court had framed the following issues for consideration :-

"a) Whether the Judgment and Decree of the trial court was right in law ?

b) Whether the appeal is to be allowed?"

While considering the first issue, the trial court had held that the defendant in the suit had not adduced sufficient proof that the plaintiff had in his possession the 'Koorchit' of the partition, dated 25.01.1957. Even though the appellant had admitted the making of the 'Koorchit' , the trial court had said that the case cited by the defendant, namely, Gopal Krishnaji Ketkar Vs Mohammed Haji Lathif and others, reported in AIR 1968, Supreme Court, does not apply to the facts and circumstances of the case in hand since adverse inference could not be gathered against the plaintiff on the ground that he was withholding the 'Koorchit' . Further, it had been stated by the first appellate court that the onus was on the defendant to show that the property was allotted to the plaintiff and the defendant, under the partition deed and it was held jointly by both of them.

12. Even though the appellant in the first appeal and the defendant in the suit had relied on the sale deed, dated 20.01.1972, by which both the defendant and the plaintiff and A.M.Annamalai Mudaliar had together

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sold five acres to one Palani Mudaliar to show that the properties were held by them as joint properties, it was found by the courts below that neither the original nor the copy of the said sale deed, dated 20.01.1972, had been filed before the court. The Appellate Court had also found that the appellant in the appeal and the defendant in the suit had admitted that the plaintiff was enjoying the properties. However, the defendant had stated that the properties were being enjoyed by the plaintiff in common. The appellate court was also of the view that the claim of the alternative prayer by the plaintiff viz., adverse possession was not proved.

13. It was further held that the oral and documentary evidence filed in favour of the plaintiff had confirmed the fact that the plaintiff was in possession and enjoyment of the suit properties subsequent to the partition effected in the year, 1957. The first appellate court had also held that the case cited by the appellant in the first appeal ,namely, Kuhalai Begum Vs Mohamad and another, (1981 Supreme Court 771) does not apply to the facts and circumstances of the present case, since the suit property was not enjoyed by the plaintiff in his own right and not as a joint property with undivided interest. Therefore, the first appellate court had confirmed the Judgment and Decree of the trial court by its Judgment and Decree, dated 17.11.1995.

14. The present second appeal S.A.No.338 of 1996 has been filed by the defendant in the suit and the appellant in the first appeal against the Judgment and Decree, dated 17.11.1995, made in A.S.No.91 of 1993 by the the learned Sub-ordinate Judge, Arni, confirming the Judgment and Decree of the Additional District Munsif, Arni, dated 28.04.1993, made in O.S.No.332 of 1990, stating that the Courts below had not appreciated the law provided under Section 114 (g) and Section 103 of The Indian Evidence Act,1872, and that the plaintiff had failed to file the 'Koorchit' , dated 25.01.1957, even though he had relied on it to claim the relief sought, inspite of the fact that the plaintiff was in possession of the same. It was further stated that the Courts below had failed to consider the entire evidence of PW.1, who is the son of the deceased plaintiff, in which he has clearly admitted the sale deed, by which an extent of five acres was sold to one Palani Mudaliar and the plaintiff had also joined in executing the same. Due to the non-filing of the 'Koorchit' by the plaintiff, adverse inference should have been made and the suit dismissed. The inconsistent plea of the plaintiff for declaration of title based on the 'Koorchit' as well as by adverse possession, could not be sustained.

15. It has been contended on behalf of the appellants that the fact that the defendant in the suit and the appellant herein had issued a notice to the plaintiff long before the suit had been filed claiming a share in the suit property and that no reply had been sent by the plaintiff for the said notice, contesting the claim of the defendant, ought to have weighed against the plaintiff. Oral evidence alone could not have supported the claim of the plaintiff, when the 'Koorchit' relied upon

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was not filed during the course of the trial. The non-filing of the 'Koorchit' by itself should have been fatal to the plaintiff's case.

16.In the present second appeal, the following substantial questions of law have been raised.

> "(1) Whether on the facts and circumstances of the case the courts below are correct in law in not drawing an adverse inference against the plaintiff as per Section 114(g) of the Evidence Act, especially, when he has failed to produce the best evidence available with him which would have thrown light on the issue in controversy?
>
> (2) Whether the judgment of the courts below deciding the facts in issue on the abstract doctrine of onus of proof is correct in law in not drawing an adverse inference, especially, when the plaintiff had been called upon to produce the 'Koorchit', in paragraph-6 of the written statement, by the appellant which is the best evidence available to prove the facts in issue?"

Based on the said substantial questions of law, the points arising for consideration are as follows :-

> "a) Whether the non-filing of the 'Koorchit' of the partition deed by the plaintiff, affects the plaintiff's case?
>
> b) Whether the present appeal has to be allowed by adverse inference due to the non-filing of the 'Koorchit', dated 25.01.1957, by the plaintiff, in support of his prayer in the suit ?
>
> c) Whether the onus of proof was on the plaintiff to show that the 'Koorchit' was not available with him at the time of the filing of the suit?"

17.On hearing the rival contentions and on a perusal of the oral and documentary evidence available on record, it is found that the courts below were right in coming to the conclusion that the plaintiff was entitled to the claim in the suit. It could not be shown by the defendant in the suit and the appellant in the present second appeal that the plaintiff had not filed the 'Koorchit' in Court, even though he was in possession of the same. There was no dispute with regard to the making of the said 'Koorchit'. The defendant in the suit and the appellant herein had not disputed the factum of the making of the 'Koorchit', Though the defendant had claimed in the written statement that the plaintiff was in possession of the original 'Koorchit', the defendant could not prove by way of oral or documentary evidence that the 'Koorchit' was in the possession of the plaintiff. If such proof had been shown, then it would have been proper for the trial court, as well as the first appellate court to draw adverse inference against the plaintiff for non-filing of the 'Koorchit', in accordance with the provisions of the Indian Evidence Act,1872. In the absence of such proof, this Court is of the considered view that no adverse inference can be drawn against the plaintiff in the

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suit and the respondent herein to deny the reliefs claimed by him.

18. It was also submitted by the learned counsel in the present second appeal that the patta alone cannot confer title on a claimant. Even though this may be the correct position of law, the courts below have granted the reliefs in favour of the plaintiff not only on the basis of the patta filed in his favour but on a complete analysis of all the other documentary and oral evidence that supported the case of the plaintiff. Further, the plaintiff had sought for a relief of 'declaration of title' based on the 'Koorchit' or partition deed, dated 25.01.1957, as well as title by adverse possession and the courts below had held that he is in possession and enjoyment of the suit properties and had rightly granted the reliefs based on the 'Koorchit', dated 25.01.1957. The appellant claims that since no reply had been given by the respondent for the notice sent on behalf of the appellant, dated 04.10.1988, marked as Exhibit B-1, it should be taken that the respondent had accepted the claim made by the appellant in the said notice. This plea, in the considered view of this Court, is unsustainable. Even though no reply had been sent on behalf of the respondent, it cannot be taken as admission of all the claims made by the appellant in the said notice.

19. The learned counsel appearing for the respondent had contended that the courts below were right in holding that the suit properties were in the possession and enjoyment of the respondent and that he was entitled to the reliefs claimed. It was submitted that the title of the respondent in the suit properties was based not only on the patta filed on his behalf but also on consideration of the factors which were in his favour, including the oral and documentary evidence. It was further stated by the learned counsel appearing on behalf of the respondent that no suggestions have been made by the defendant in the suit and the appellant herein stating that the evidence of P.W.1 relating to the 'Koorchit' was false. Having accepted the execution of the 'Koorchit', the appellant cannot claim that an adverse inference should be drawn against the respondent for the non-filing of the 'Koorchit' . The appellant had not proved his claim that the 'Koorchit' was in respondent's possession and that he had intentionally avoided filing of the same before the trial court. The statements made by the witnesses examined on behalf of the plaintiff clearly show that the claims made by the plaintiff in the suit and the respondent in the present appeal were true and justifiable. It was also stated that though the defendant had knowledge of the patta in favour of the respondent, with regard to the suit properties, no steps had been taken by the appellant to cancel or modify the same till date.

20. On analysing the rival contentions and on a perusal of the records placed before this court, this court is of the considered view that the courts below were right in coming to the conclusion that the plaintiff in the suit O.S.No.332 of 1990 and the respondent in the present second appeal was entitled to the reliefs prayed for. The findings of the courts below are neither incorrect nor perverse, to warrant

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interference by this court. In such view of the matter, the present second appeal is liable to be dismissed. Accordingly, it is dismissed. No costs.

Sd/-
Asst. Registrar.

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Sub Asst. Registrar.

To
1. The Subordinate Judge, Arni.

2. The Additional District Munsif, Arni.

+ 1 CC To Mr.R.Gopalakrishnan, Advocate SR NO.11915

+ 1 CC To M/s.Sarvabhauman Associates, Advocate SR NO.12047

S.A.No.338 of 1996

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